

# Golden Gate University Law Review

---

Volume 12

Issue 1 *Ninth Circuit Survey*

Article 4

---

January 1982

## Communications Law

Marla Katz Westover

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/ggulrev>



Part of the [Communications Law Commons](#)

---

### Recommended Citation

Marla Katz Westover, *Communications Law*, 12 Golden Gate U. L. Rev. (1982).  
<http://digitalcommons.law.ggu.edu/ggulrev/vol12/iss1/4>

This Note is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact [jfischer@ggu.edu](mailto:jfischer@ggu.edu).

# COMMUNICATIONS LAW

## I. SUBSCRIPTION TELEVISION AND SECTION 605 OF THE COMMUNICATIONS ACT—THE PATHOLOGY OF AN ANTIQUATED STATUTE

### A. INTRODUCTION

In *National Subscription Television v. S & H TV*,<sup>1</sup> the Ninth Circuit held that over-the-air subscription television (STV) is not broadcasting for the use of the general public and is, therefore, protected by section 605 of the Communications Act of 1934.<sup>2</sup> By ruling that section 605 prohibits the intercept-

---

1. 644 F.2d 820 (9th Cir. 1981) (per Trask, J., the other panel members were Schroeder, J. and Carroll, D.J., sitting by designation).

2. Communications Act of 1934, ch. 652, § 605, 48 Stat. 1103-04 (1934) (current version at 47 U.S.C. § 605 (1976)). Section 605 provides in part:

Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination . . . . No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. *This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is*

## 2 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 12:1]

tion and divulgence of STV programming, the court raised a protective umbrella over the STV industry. As new video systems emerge, however, the difficulties of operating under legislation which stems from the 1934 Communications Act will become more severe. Because the language of the Act is outmoded, it no longer corresponds to contemporary communications technology and courts, like the Ninth Circuit, must continually reinterpret its provisions. This Note will examine the court's reasoning, compare its decision to those of other courts, and ultimately conclude that either Congress or the Federal Communications Commission (FCC) should provide protection for the STV industry.

## B. FACTS

National Subscription Television (NST) transmits an encoded visual signal which ordinary television sets receive in scrambled form.<sup>3</sup> To obtain intelligible visual and aural signals, subscribers must lease special decoding devices from NST.<sup>4</sup> The decoders enable NST to determine audience program preferences and to generate monthly subscription bills.<sup>5</sup>

Defendants manufactured and distributed decoding devices, unauthorized by NST, which were capable of unscrambling NST's signals.<sup>6</sup> Consequently, purchasers of defendants' decod-

---

*broadcast or transmitted by amateurs or others for the use of the general public, or which relates to ships in distress.*

47 U.S.C. § 605 (1976) (emphasis added).

3. The FCC promulgated specific rules to regulate STV operations. See 47 C.F.R. §§ 73.641-.644 (1980). NST leased transmission facilities daily from plaintiff Oak Broadcasting Systems, Inc. for a specified number of hours. Oak is licensed to broadcast television signals over a UHF channel.

4. 644 F.2d at 821. FCC regulations require that STV operators lease decoders to subscribers. 47 C.F.R. § 73.642(f)(3) (1980). The FCC adopted the leasing requirement to protect the public from the technical obsolescence of equipment and to give customers greater flexibility in changing systems. *In re Amendment of Part 73 of the Commission's Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service* Fourth Report and Order, 15 F.C.C.2d 466, 552 (1966) [hereinafter cited as Fourth Report and Order].

In Fourth Report and Order, the FCC determined that the adoption of a single subscription television technical system would stifle inventiveness and the incentive to create new STV systems. *Id.* at 535. Because the FCC established standards which ensured the transmission of satisfactory pictures and sounds, the Commission concluded that the marketplace should be the proving ground of competing STV systems. *Id.* at 536.

5. 644 F.2d at 821.

6. *Id.*

ers received NST's programming free of any subscription fees. In reversing the district court's dismissal of plaintiff's claim for damages and injunctive relief, the Ninth Circuit held that section 605 protects over-the-air subscription television against interception and divulgence.<sup>7</sup>

### C. BACKGROUND

#### *Legislative History*

Section 605 protects radio communications against unauthorized publication and divulgence.<sup>8</sup> The scope of protection afforded by section 605 is limited, however, by the following proviso: "This section shall not apply to the receiving, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public . . . ."<sup>9</sup> Thus, it is important to determine what type of communications fall within the meaning of the proviso because they are not protected under the Act.

The first statutory restraint on disclosure of radio transmissions appeared in the Radio Act of 1912.<sup>10</sup> In 1924, a bill introduced in the House of Representatives contained a confidentiality provision with a caveat similar to that in the present section 605.<sup>11</sup> A similar proviso surfaced in different bills of

7. *Id.* at 826.

8. 47 U.S.C. § 605 (1976). "Radio communication," defined in § 153(b), includes the transmission by radio of signals, pictures and sounds of all kinds. 47 U.S.C. § 153(b) (1976). Section 605, therefore, protects television communications. *See also* Allen B. DuMont Laboratories v. Carrol, 184 F.2d 153 (3d Cir. 1950), *cert. denied*, 340 U.S. 929 (1951).

In addition, a private right of action has been recognized under § 605. *See* Chartwell Communications Group v. Westbrook, 637 F.2d 459, 466 n.5 (6th Cir. 1980); Reitmeister v. Reitmeister, 162 F.2d 691, 694 (2d Cir. 1947); Orth-O-Vision, Inc. v. Home Box Office, 474 F. Supp. 672, 681 n.8 (S.D.N.Y. 1979).

Section 605 also protects intrastate as well as interstate communications. *See* Benanti v. United States, 355 U.S. 96, 104 (1957); Weiss v. United States, 308 U.S. 321 (1939).

9. 47 U.S.C. § 605 (1976). For relevant text of § 605 prior to this proviso, see note 4 *supra*.

10. Radio Act of 1912, ch. 287, §§ 1, 4, 37 Stat. 302 (1912). Regulation 19 of the Act provided in pertinent part: "No person or persons engaged in or having knowledge of the operation of any station or stations, shall divulge or publish the contents of any messages transmitted or received by such station, except to the person or persons to whom the same may be directed . . . ." *Id.* 37 Stat. at 307.

11. H.R. 7357, 68th Cong., 1st Sess. § 12 (1924). Section 12 provided, "this section shall not apply to the receiving, divulging, publishing, or utilizing of the contents of any

1924<sup>12</sup> and 1925<sup>13</sup> which were never enacted.

The Radio Act of 1927 codified the proviso in section 27, its confidentiality provision.<sup>14</sup> Congressional reports indicate that section 27 was based upon existing law.<sup>15</sup>

During the debate on the 1927 Act, Senator Pittman remarked:

This language [of section 27] does not limit such message to one of a prior personal nature, and therefore must apply to all messages. The language in its uncertainty is dangerous. . . . It might be construed to prevent the interception and publication of a speech by the President of the United States sent by one radio corporation to another radio corporation.<sup>16</sup>

The proponents of the bill did not respond to Senator Pittman's interpretation of the section, and the conference bill passed without further amendment. Because Senator Pittman did not

radio conversation transmitted for the use of the general public . . . ." *Hearings Before the Committee on the Merchant Marine and Fisheries on H.R. 7357 to Regulate Radio Communication*, 68th Cong., 1st Sess. 6 (1924).

12. S. 2930, 68th Cong., 1st Sess. (1924). A report issued by the Committee on the Merchant Marine and Fisheries concerning S. 2930 pronounced:

Section 16 of the bill is designed to secure secrecy in messages. There has been much complaint that unauthorized persons have intercepted messages and have made improper use of the information contained therein. It is provided that the section shall not apply to the receiving or utilizing the contents of radio communications transmitted by amateurs or others for the use of the general public or relating to ships in distress.

H.R. REP. No. 719, 68th Cong., 1st Sess. 7 (1924).

13. The same provisional language appeared in a 1925 bill, H.R. 5589, 69th Cong., 1st Sess. § 14 (1925).

14. Radio Act of 1927, ch. 169, § 27, 44 Stat. 1162 (1927). Section 27 states in part: "[T]his section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcasted or transmitted by amateurs or others for the use of the general public . . . ."

15. The 1926 Senate report stated: "The provisions regarding the protection of ship signals and messages against reception and use by unauthorized persons are largely a redraft of existing law and seem necessary and proper provisions." S. REP. No. 772, 69th Cong., 1st Sess. 5 (1926).

The House report provided: "The bill also seeks to protect messages and the contents thereof against reception and use by unauthorized persons. The section is a redraft of a provision of existing law. It seems to the Committee a proper and necessary provision." H.R. REP. No. 404, 69th Cong., 1st Sess. 4 (1926).

16. 68 CONG REC. 4109 (1927).

mention the proviso to section 27, however, his remarks have limited value in unraveling the precise meaning of the entire section.<sup>17</sup>

---

17. The senate debates on the passage of the 1927 Act also reveal that senate members contemplated subscription broadcast services.

Mr. DILL. Yes, Mr. President; I understand there are inventions for broadcasting that would make it necessary for the person who listens to the program produced by that station to pay a charge in the form of having an attachment that would enable him to receive that particular broadcasting.

. . . .

Mr. COPELAND. That means that by a little conspiracy on the part of the licensees and the patentees of various devices the wave lengths could be arranged in such a way, or the transmission be so made, that only this particular invention could be used to receive it.

Mr. DILL. Mr. President, in the first place, the commission has power to prevent any such invention being put on any transmitting apparatus if it sees fit to do so. I do not know why the commission should prevent it, because if any broadcaster wants so to limit his listening public to those who have bought the attachment, while the other broadcasters allow everybody to listen, that is his privilege. I do not know that we want to prevent men in this country from going into the private business of furnishing radio programs any more than furnishing private programs of some other kind.

. . . .

Mr. WALSH of Montana. Pardon me. So, likewise, if a man had a particular line of goods that he wanted to advertise, he would not go to a corporation that sent out his impressions only to a limited number of people; he would go the general broadcasting station. On the other hand, some people would like to get their impressions, so that they would not be altogether public, and they would care to subscribe to the broadcasting arrangement that would reach only a limited audience. I can not understand why anybody should want to prevent anybody who cares to do so from putting in use this invention.

68 CONG. REC. 3033 (1927).

Although Senator Dill indicated that subscription services should be allowed, he did not specifically assert that such communications would be protected from interception. Furthermore, according to Senator Dill, the Communications Commission would have authority under the bill to permit or prohibit subscription broadcast services. The Senator's remarks, therefore, only suggest that subscription broadcast services were protected from divulgence under the bill.

The history and purposes of the Radio Act of 1927 are discussed in 27 COLUM. L. REV. 726 (1927). For an interesting discussion of the Radio Act of 1927 as it concerns the protection of transmissions against interception, reproduction and rebroadcast under the then current law, see Caldwell, *Piracy of Broadcast Programs*, 30 COLUM. L. REV. 1087 (1930).

In 1934, Congress revised the Communications Act<sup>18</sup> and created the Communications Commission to regulate and supervise the industry.<sup>19</sup> Otherwise, the Act did not substantially alter existing legislation.<sup>20</sup> Moreover, both the Senate and House committee reports announced that the confidentiality provision found in section 605 of the 1934 Act was "based upon section 27 of the Radio Act [of 1927]" although its application was extended to wire communications.<sup>21</sup>

In 1968, as part of the Omnibus Crime Control and Safe Streets Act of 1968, Congress further amended section 605.<sup>22</sup> As amended, section 605 superceded its predecessor, but the Senate committee report stated: "The section [605] is not intended to apply to radio broadcasts or transmission by amateurs or others for the use of the general public . . . ."<sup>23</sup> An examination of the legislative history of section 605, therefore, provides little guidance in determining the reach of the proviso.

### *Judicial Interpretations of Section 605*

In 1967, the courts first addressed the relationship between section 605 and subscription broadcast services. In *KMLA Broadcasting Corp. v. 20th Century Cigarette Vendors Corp.*,<sup>24</sup> plaintiffs transmitted a background music program to subscribers over a subcarrier frequency, entitled a multiplex channel.<sup>25</sup>

18. Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934).

19. Creation of the Commission unified the control of the various agencies concerned with interstate and foreign communications. Previously, jurisdiction over common carriers was held by the Interstate Commerce Commission. The executive branch assigned frequencies for government radio stations. The Department of Commerce licensed station operators, and the Federal Radio Commission, created by the Radio Act of 1927, regulated radio communications. See generally 21 VA. L. REV. 318 (1935).

20. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940).

21. H.R. REP. NO. 1850, 73d Cong., 2d Sess. 9 (1934); S. REP. NO. 781, 73d Cong., 2d Sess. 11 (1934).

22. S. REP. NO. 1097, 90th Cong., 2d Sess. 107 (1968).

23. *Id.* at 108.

24. 264 F. Supp. 35 (C.D. Cal. 1967).

25. *Id.* at 37. KMLA was licensed under a Subsidiary Communications Authorization to transmit a subscription background music service on a separate, subcarrier frequency. Multiplexing is the simultaneous transmission of broadcasting over a FM station's main frequency and a background music program to subscribers over its multiplex channel. *Id.*

Currently, an FM broadcast licensee must apply for a Subsidiary Communications Authorization (SCA) to provide limited types of subsidiary services. 47 C.F.R. § 73.293 (1980).

Because ordinary radio receivers could not pick up the frequency, plaintiffs provided each subscriber with a special multiplex receiver. Defendants, without authorization from the plaintiffs, installed multiplex tuners capable of receiving KMLA's background music in numerous business establishments.

The *KMLA* court stated that "[t]he question of whether KMLA's multiplex transmissions over its subcarrier frequency constitute 'broadcasting' so as to make the protections of section 605 inapplicable because of the proviso . . . hinges on whether KMLA intended a dissemination of its multiplex radio communications to the general public."<sup>26</sup> Because the nature of the service negated any intention that the transmission be received by the public, the *KMLA* court determined that multiplexing was not broadcasting.<sup>27</sup> The controlling factors in this determination were the use of special receiving equipment (i.e. the technical inability of ordinary sets to receive the transmission)<sup>28</sup> and the composition of the service directed to the specific needs of industrial and commercial institutions.<sup>29</sup>

---

26. 264 F. Supp. at 40 (footnote omitted).

27. *Id.* at 42. The statutory definition of broadcasting is "the dissemination of radio communications intended to be received by the public . . ." 47 U.S.C. § 153(o) (1976). In the 1930's, the FCC interpreted broadcasting as the dissemination of communications to the general public. According to the FCC, transmissions to specific listeners were point-to-point communications not authorized by a broadcast license. See *In re Adelaide Lillian Carrell*, 7 F.C.C. 219 (1939) (delivering messages in cooperation with local police was contrary to terms of station license because transmissions were of individual messages); *In re Bremer Broadcasting Co.*, 2 F.C.C. 79 (1935) (coded horse racing results contrary to broadcasting license which authorized disseminations to the general public); *In re Application of Scroggin & Co. Bank*, 1 F.C.C. 194 (1935) (alleged doctor answering questions and giving advice was point-to-point or individual communication).

28. 264 F. Supp. at 42. Limited access to a signal is only one element in determining the sender's intent to reach the public. The courts have also protected transmissions with extensive public access. See *United States v. Sugden*, 226 F.2d 281 (9th Cir. 1955) (private radio communications over a licensed farm radio station protected under § 605 once operators were licensed, even though anyone might hear them); *Reston v. FCC*, 492 F. Supp. 697 (D.C. Cir. 1980) (FCC need not release recordings of transmissions between amateur radio stations because § 605 demanded nondisclosure); *United States v. Fuller*, 202 F. Supp. 356 (N.D. Cal. 1962) (police and fire agency radio messages, receivable on any short wave radio, were private transmissions protected by § 605).

29. 264 F. Supp. at 42. One writer suggests that the *KMLA* court focused upon the subscribers' needs rather than the nonsubscribing public's taste, which might be the same. The public would probably be extremely interested in the uninterrupted music that KMLA's subscribers received. Program content, therefore, should not be determinative of the transmitter's broadcasting intent. Note, *Federal Communications Law and Unfair Competition: Clearing Up Some Static for Pay TV and Radio: Unauthorized Reception of Nonbroadcast Radio Communications*, 56 CALIF. L. REV. 526 (1968).



The court concluded that multiplexing was directed to and received by subscribers alone.<sup>30</sup> Therefore, because KMLA's transmissions were not broadcast as defined by the Act, the KMLA court ruled that section 605 protected the plaintiffs.<sup>31</sup> The court also noted that FCC regulations for multiplexing and regular broadcast services differed substantially.<sup>32</sup>

The KMLA court relied in part on *Functional Music, Inc. v. FCC*,<sup>33</sup> the leading case on the distinction between broadcast and non-broadcast communications under section 3(o) of the Act.<sup>34</sup> In *Functional Music*, an FM broadcasting station used a simplex system to superimpose a subscription music service on its traditional broadcasting operation. Subscribers received the station's regular broadcasts free of advertisements.<sup>35</sup>

In ruling that simplexing was broadcasting, the *Functional Music* court declared that neither the presentation of a highly specialized format nor the charging of a fee for communications services was dispositive of one's intent or status as a broadcaster.<sup>36</sup> The court announced that "[b]roadcasting remains broadcasting even though a segment of those capable of receiving the broadcast signal are equipped to delete a portion of that signal. . . . [F]unctional programming can be, and is, of interest to the general radio audience."<sup>37</sup>

Furthermore, the court found that *Functional's* programming was designed to reach both subscribers and non-subscribers.<sup>38</sup> Thus, in both KMLA and *Functional Music*, the courts, in determining whether the transmissions constituted broadcasting,

30. 264 F. Supp. at 42.

31. *Id.*

32. *Id.*

33. 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).

34. Communications Act of 1934, ch. 652, § 3(o), 48 Stat. 1065 (1934) (current version at 47 U.S.C. § 153(o) (1976)).

35. 274 F.2d at 544. With a simplex system, the broadcaster transmitted a super-sonic signal which caused the special equipment in the subscribers' receivers to momentarily disconnect the broadcast signal. Simplexing involves the emission of one FM signal over each allocated FM channel. Subscription music services, therefore, emitted a single signal received by both subscribers and the non-subscribing public. Subscribers, however, could delete a portion of the transmission with special receiving equipment. *Id.* at 545 n.4.

36. *Id.* at 548.

37. *Id.* at 548-49.

38. *Id.* at 548.

looked to whether or not the transmitter intended that the public receive its signals.

In 1979, a New York district court, in *Orth-O-Vision, Inc. v. Home Box Office*<sup>39</sup> also relied upon *Functional Music* to deny Home Box Office's (HBO) motion for summary judgment on its Federal Communications Act claim. In *Orth-O-Vision*, HBO sought summary judgment and a permanent injunction under section 605 when Orth-O-Vision intercepted HBO's signals without authorization.

The court queried whether "the converse of the rule in *Functional Music* is also true: does the transmission of programming which is of interest to the general public constitute 'broadcasting' even though one cannot view the programs without paying a fee for special equipment?"<sup>40</sup> In reaching an affirmative answer, the court reviewed the FCC's ruling that over-the-air subscription television constituted broadcasting. According to the FCC:

The evident intention of any station transmitting subscription programs would be to make them available to all members of the public within range of the station . . . . [T]he primary touchstone of a broadcast service is the intent of the broadcaster to provide radio or television service without discrimination to as many members of the general public as can be interested in the particular program.<sup>41</sup>

The *Orth-O-Vision* court observed that HBO had not distinguished its multipoint distribution service (MDS) transmissions from those of STV systems.<sup>42</sup> Because both systems ap-

---

39. 474 F. Supp. 672 (S.D.N.Y. 1979).

40. *Id.* at 681-82.

41. *In re* Amendment of Part 73 of the Commission's Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service Further Notice of Proposed Rulemaking and Notice of Inquiry [hereinafter cited as Further Notice of Proposed Rulemaking and Notice of Inquiry], 3 F.C.C.2d 1, 9 (1966).

42. 474 F. Supp. at 682. The FCC authorized MDS broadcasting in 1962 by allocating certain microwave frequencies, 2150-2162 megaHertz, to be used in common carrier service. 47 C.F.R. § 21.901(a) (1980). An MDS operator transmits a signal which is translated into a visual picture by the receiver. An MDS system involves the transmission of signals by a fixed station on a microwave frequency towards numerous fixed MDS receivers. A special receiver is required to pick up the signal because it is transmitted on a microwave frequency. A television outfitted with the receiver will direct frequencies onto

pealed to a mass audience and technically were capable of reaching the general public, the court concluded that such transmissions constituted broadcasting and, therefore, were exempt from section 605 protection.<sup>43</sup> Thus, the *Orth-O-Vision* court viewed mass appeal and the technological capability to reach the general public as indicative of a transmitter's broadcasting intent.

In *Home Box Office, Inc. v. Pay TV of Greater New York*,<sup>44</sup> defendant retransmitted HBO's subscription television programming without authorization. Defendant claimed that plaintiff had consented to defendant's interception and was guilty of laches, but failed to claim that the signals were unprotected, or fell within the proviso. The *HBO* court remarked in dictum that because HBO transmitted to some affiliates by an MDS<sup>45</sup> it had not manifested any intention that the general public receive its programming and should be afforded section 605 protection.<sup>46</sup>

Until 1980, courts attempting to determine whether section 605 protected subscription broadcast services looked to the definition of broadcasting<sup>47</sup> to resolve the issue. Thus, transmissions that constituted broadcasting pursuant to section 153(o) fell within the proviso to section 605 and were, therefore, unprotected.<sup>48</sup> Conversely, transmissions that did not constitute broadcasting avoided the reach of the proviso and were protected by section 605.<sup>49</sup>

In the recent case of *Chartwell Communications Group v.*

---

an unoccupied channel.

MDS and STV are technologically dissimilar, and the court's analysis was probably inapt. Although the court rejected HBO's § 605 claim, it granted HBO partial summary judgment and a permanent injunction on its copyright claim. 474 F. Supp. at 687.

For an excellent introduction into various video systems employed today, see *The Development of Video Technology*, 25 N.Y.L.S.L. Rev. 789 (1980).

43. 474 F. Supp. at 682.

44. 467 F. Supp. 525 (E.D.N.Y. 1979).

45. For a discussion of MDS broadcasting, see note 42 *supra*.

46. 467 F. Supp. at 528.

47. 47 U.S.C. § 153(o) (1976).

48. See *Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672, 680-81 (S.D.N.Y. 1979).

49. See *Home Box Office, Inc. v. Pay TV of Greater New York*, 467 F. Supp. 525, 528 (E.D.N.Y. 1979); *KMLA Broadcasting Corp. v. 20th Century Cigarette Vendors Corp.*, 264 F. Supp. 35, 41-42 (C.D. Cal. 1967).

*Westbrook*,<sup>50</sup> the operator of an over-the-air subscription television service raised section 605 protection to enjoin defendants from selling electronic decoders that enabled non-subscribers to receive plaintiffs' signals. The *Chartwell* court held that STV was not broadcasting intended for the use of the general public within the meaning of the proviso.<sup>51</sup> The court distinguished "between making a service available to the general public and intending a program for the use of the general public," and found that the "dual nature of STV is that while it may be available to the general public, it is intended for the exclusive use of paying subscribers."<sup>52</sup>

The *Chartwell* court noted that a recent staff report of the FCC's Office of Plans and Policy<sup>53</sup> questioned the wisdom of classifying STV as broadcasting for section 605 purposes.<sup>54</sup> The court concluded that, under the proviso to section 605, the determination of which communications constitute broadcasting depends upon whether the transmission was intended for general public use.<sup>55</sup> Although the *Chartwell* court acknowledged that mass appeal and mass availability are factors in making that determination, it held that those factors could be negated by objective evidence.<sup>56</sup>

The court held that STV's method of sending scrambled signals, unintelligible without a decoder, provided objective evidence that STV was not intended for public use.<sup>57</sup> Furthermore, the *Chartwell* court found no meaningful distinction between the communications protected in *KMLA* and STV transmissions. Both required special equipment in order to produce an intelligible signal.<sup>58</sup>

Thus, the *Chartwell* court interpreted "broadcasting," for section 605 purposes, to require an examination of the intent to

---

50. 637 F.2d 459 (6th Cir. 1980).

51. *Id.* at 465.

52. *Id.*

53. FCC OFFICE OF PLANS AND POLICY, POLICIES FOR REGULATION OF DIRECT BROADCAST SATELLITES (1980) [hereinafter cited as DIRECT BROADCAST SATELLITES].

54. *Id.* at 124 n.17.

55. 637 F.2d at 465.

56. *Id.*

57. *Id.*

58. *Id.*

transmit for the use of the public, rather than the intent to be received by the public.

#### D. COURT'S ANALYSIS

In *National Subscription Television*, defendants claimed that program appeal and signal delivery capability determined whether a transmission is section 153(o) broadcasting, and that section 153(o) broadcasting should be excluded from section 605 protection by virtue of the proviso. The Ninth Circuit, however, concluded that section 153(o) did not control the reach of the proviso.<sup>59</sup>

After considering prior case law, the Ninth Circuit decided not to follow past decisions which coupled section 153(o) broadcasting with the proviso to section 605.<sup>60</sup> Therefore, the court rejected the analytical framework adopted in *Orth-O-Vision*, whereby broadcasting as defined by section 153(o) was unprotected because it fell within the proviso to section 605.<sup>61</sup>

In ruling that section 605 protected STV, the Ninth Circuit distinguished broadcasting from use.<sup>62</sup> Because section 605 does not apply to any radio communication broadcast or transmitted for the use of the general public, the court reasoned that "an individual might 'broadcast'—i.e. transmit a signal over the airwaves with the intent that it be received by the public within the meaning of section 153(o)—without such broadcasting being for the use of the public within the meaning of the proviso."<sup>63</sup>

The court recognized that NST designed its programming to attract a mass audience and offered it to any member of the public willing to pay the subscription price.<sup>64</sup> The Ninth Circuit opined, however, that NST's transmission of scrambled signals demonstrated its intent that only paying subscribers could use the broadcast.<sup>65</sup>

---

59. 644 F.2d at 823-24.

60. *Id.* at 822-24.

61. *Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. at 682.

62. 644 F.2d at 824.

63. *Id.*

64. *Id.*

65. *Id.*

Although the Ninth Circuit did not adhere to the *Chartwell* court's reinterpretation of the term broadcasting for section 605 purposes, it accepted the *Chartwell* court's premise that STV signals were not broadcast for the public use. The court also rejected defendants' argument that the phrase "for the use of general public" in the proviso modifies the word "transmitted," and that "broadcast" stands alone.<sup>66</sup> The Ninth Circuit ruled, therefore, that section 605 protected NST's signals.<sup>67</sup>

Another critical factor in the court's decision was the FCC determination that over-the-air STV promotes the public interest because it is an alternative communications system which increases the diversification of service and choice of programs.<sup>68</sup> The Ninth Circuit observed that the defendants' activities threatened the economic viability of NST, in that purchasers of defendants' decoders received NST's programming without paying any subscription fees. This loss of revenue, the court reasoned, prompted less attractive programming and discouraged capital investment in the STV industry.<sup>69</sup>

Furthermore, the court stated that defendants' sale of decoding devices contravened the FCC's consumer protection policy which requires STV operators to lease decoders.<sup>70</sup> Thus, in finding that section 605 protected STV programming, the court believed that its decision supported express FCC policies encouraging the development of over-the-air STV operations.

## E. ANALYSIS

### *Availability and Use*

The Communications Act specifically mandates the FCC to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest . . . ."<sup>71</sup> In light of this mandate, the Ninth Circuit's decision ostensibly embraces the spirit of the Act by ensuring the continued viability of STV service.

---

66. *Id.* at 825.

67. *Id.* at 826.

68. *Id.* at 825. See Fourth Report and Order, *supra* note 4, at 586.

69. 644 F.2d at 825.

70. *Id.* See 47 C.F.R. § 73.642(f)(3) (1980).

71. 47 U.S.C. § 303(g) (1976).

The success of over-the-air STV depends upon limiting its reception to subscribers. In *National Subscription Television v. S & H TV*,<sup>72</sup> the Ninth Circuit guaranteed an STV operator limited access.

One must recall, however, that the Communications Act, based substantially on the Radio Act of 1927, emerged in 1934<sup>73</sup> when over-the-air STV, cable TV services and satellite communications were non-existent and unforeseeable. Because they must reinterpret this outdated Act to fit contemporary needs, the federal courts have inconsistently applied its provisions, and will continue to do so until Congress intervenes.

Moreover, the Ninth Circuit's declination to follow prior case law and its great concern over STV's commercial survival suggest that the court's analysis in *National Subscription Television* was result oriented. The Ninth Circuit based its interpretation of section 605 upon a technical evaluation of statutory language. Dissecting the phrase "broadcast or transmitted for the use of the general public" in the proviso,<sup>74</sup> the court focused its attention on the difference between broadcasting (under section 153(o), the intent to be received by the public)<sup>75</sup> and use. The court thus affirmed the proposition announced in *Chartwell Communications Group v. Westbrook*<sup>76</sup> that public availability and use are separate concepts.

This distinction, however, is negligible in the context of radio and television communications. A signal broadcast over public airwaves will be used by the public, unless the signal exists in a vacuum.<sup>77</sup> Moreover, STV operators transmit signals over television broadcast frequencies received by all ordinary television sets in the reception area. Therefore, the public has unrestricted

---

72. 644 F.2d 820 (9th Cir. 1981).

73. Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934).

74. 47 U.S.C. § 605 (1976).

75. *Id.* § 153(o).

76. 637 F.2d 459 (6th Cir. 1980).

77. We recognize in the criminal context, for example, that a conversation between two people in public negates any expectation of privacy in that communication. See *Katz v. United States*, 389 U.S. 347 (1967). Although the parties may speak in code or in a foreign language, a passerby who overhears the conversation may certainly "use" it. We would not prohibit the passerby from decoding the communication, or from using a dictionary to aide in translating it. Similarly, a signal broadcast over the public airwaves will be used by the public, until the legislature limits its reception to specific individuals.

access to the signal.

In *National Subscription Television* the court declared that although STV is broadcasting, it is not intended for the public's use because the transmitted signal is unintelligible without a decoder.<sup>78</sup> The court in *KMLA*, however, held that radio transmissions which could not be heard without special receiving equipment were not broadcast within the meaning of section 153(o).<sup>79</sup> The contents of the programs and the necessity of special equipment to receive them led the *KMLA* court to conclude that the transmissions were not intended to be received by the public.<sup>80</sup>

The nature of STV service similarly negates any intent for public reception. Although STV operators offer a product to the general public, their service is intended to reach only those members of the public willing to pay a fee.<sup>81</sup> Therefore, a re-examination of STV's status as broadcasting is appropriate.

The Ninth Circuit probably could have relied on *KMLA* to find that STV is not broadcasting.<sup>82</sup> In doing so, the court's analysis of section 605 would have been consistent with prior case law which looked to the definition of broadcasting in determining the reach of the proviso.<sup>83</sup> Furthermore, such a decision would have provided section 605 protection for STV.<sup>84</sup>

The court may have feared, however, that a reclassification of STV as a non-broadcast service would prove too much. The FCC determined that STV is broadcasting when it authorized the service on channels assigned to television broadcasting.<sup>85</sup> A ruling that STV does not constitute broadcasting, therefore,

---

78. 644 F.2d at 824 (citing *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 465-67 (6th Cir. 1980)).

79. 264 F. Supp. at 42.

80. *Id.*

81. DIRECT BROADCAST SATELLITES, *supra* note 53.

82. For a discussion of *KMLA*, see notes 24-32 *supra* and accompanying text.

83. See *Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672, 680-81 (S.D.N.Y. 1979); *Home Box Office, Inc. v. Pay TV of Greater New York*, 467 F. Supp. 525, 528 (E.D.N.Y. 1979); *KMLA Broadcasting Corp. v. 20th Century Cigarette Vendors Corp.*, 264 F. Supp. 35, 41-42 (C.D. Cal. 1967).

84. See *KMLA Broadcasting Corp. v. 20th Century Cigarette Vendors Corp.*, 264 F. Supp. 35, 42 (C.D. Cal. 1967).

85. Further Notice of Proposed Rulemaking and Notice of Inquiry, *supra* note 41, at 8-11.



might implicate the FCC's authorization of STV<sup>86</sup> and could alter the nature of the FCC's jurisdiction over the service.<sup>87</sup>

---

86. Statements made by the FCC in 1957 indicate that the Commission did not view its determination of whether STV constituted broadcasting as controlling the authorization of the service on traditional broadcast frequencies. According to the FCC:

There is no question as to the Commission's authority to authorize the use of radio frequencies for numerous kinds of services which are neither broadcast services nor common carrier services. The safety and special radio services abound in examples, including the use of radio for aviation and marine navigation, and by industrial firms, fire and police departments, taxis, and many other nonbroadcast users.

Nor, in our opinion, does the fact that selected frequencies have been allocated primarily for broadcast uses bar our authorization of the use of such frequencies for nonbroadcast purposes. Thus, as we have already stated, we believe that the question of whether subscription television as proposed on this record is or is not properly classifiable as "broadcasting" under the definition in section 3(o) of the Communications Act is not controlling as to whether the Commission has the statutory power to authorize the use of television channels for a subscription TV service.

In the Matter of Amendment of Part 73 of the Commission's Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service First Report. 23 F.C.C.2d 532, 541 (1975).

When the FCC authorized STV, however, it concluded that the service did constitute broadcasting. Further Notice of Proposed Rulemaking and Notice of Inquiry, *supra* note 41, at 8-11. Based on the Commission's findings, the court in *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194, 195 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970), affirmed the FCC's authorization of national over-the-air STV on a permanent basis. Thus, the FCC's authority to allocate broadcast frequencies to non-broadcast services may still be questioned.

87. The Court, in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), ruled that the FCC's jurisdiction over cable, a non-broadcast service, was "restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *Id.* at 178.

The reclassification of STV as a non-broadcast service might similarly restrict the FCC's jurisdiction over STV. Recently, however, the FCC has repealed many of its regulations concerning STV. *See In re Repeal of Programming Restrictions on Subscription Television Report and Order*, 42 RAD. REG. 2d (P & F) 1207 (1978) (repealing restrictions on STV presentation of sports and commercial advertising); *In re Repeal of Movie Restrictions on Subscription Television Report and Order*, 41 RAD. REG. 2d (P & F) 1491 (1977) (repealing regulations restricting the presentation of feature films on STV); *Radio Broadcast Services, Amending Rules Regarding the Subscription Television Service*, 44 Fed. Reg. 60,091, 60,095 (1979) (repealing one-to-a-community rule).

Furthermore, the Commission is currently treating cable and STV equally because it recognizes that both services are directly competitive. *In re Repeal of Movie Restrictions on Subscription Television Report and Order*, 41 RAD. REG. 2d (P & F) 1491, 1493 (1977).

A reclassification of STV as a non-broadcast or hybrid service at this time, therefore, would not impinge on the FCC's jurisdiction over the service. A problem might arise in the future if the FCC wanted to enact additional regulations over STV as a broadcasting

*FCC Interpretation of Broadcasting*

Although the FCC ruled that STV is broadcasting, it was not required to do so. There are historical precedents which indicate that the FCC could have classified STV as a non-broadcast or hybrid service, and as such, STV would probably have been protected under section 605.

During the 1930's, the FCC differentiated between broadcasting and fixed or point-to-point communications. Broadcasting generally encompassed unaddressed, universally disseminated transmissions, while fixed or point-to-point communications were those addressed to a specific person or reception point.<sup>88</sup> The FCC emphasized that under the terms of their licenses, stations could transmit standard broadcast services of general interest to the public, although point-to-point communications were disallowed.<sup>89</sup>

In 1941, the FCC concluded that a subscription radio service was broadcasting, and authorized its operation on an experimental basis.<sup>90</sup> Thereafter, the Commission removed subscrip-

---

service. This seems highly unlikely, however, because additional regulations would place STV at a severe disadvantage to competitors such as cable and MDS.

88. *In re Adelaide Lillian Carrell*, 7 F.C.C. 219, 222 (1939); *In re Bremer Broadcasting Co.*, 2 F.C.C. 79 (1935); *In re Application of Scroggin & Co. Bank*, 1 F.C.C. 194 (1935). See note 27 *supra*.

89. See cases cited in note 88 *supra*.

90. *In re Muzak Corp.*, 8 F.C.C. 581 (1941). The Commission noted that "[t]he service . . . will be available to the general public; any member of the public, without discrimination, may lease the equipment to receive the service." *Id.* at 582.

The FCC's decision to authorize a subscription service over the broadcast band generated comments in the Congress. The 1952 House debates on S. 658 included these remarks:

It will be remembered that the decision in the *Muzak* case was a memorandum decision on an application for an experimental license, and that the authorization was issued upon the express understanding that it did not constitute a finding by the Commission that the operation authorized would be in the public interest beyond the express terms of the grant.

. . . .  
 . . . [I]t is my intention, if no one else does, to introduce a bill which will provide for a further definition of "broadcasting." I have certain ideas on that which would not include subscription television or subscription radio as broadcasting but probably provide for classification of such service as a common carrier or contract service of some sort. I think it should not be classified in the broadcast field as the Commission has said in the *Muzak* case that it could be.

tion music services from standard broadcast frequencies by establishing multiplexing regulations.<sup>91</sup> The FCC recognized that subscription FM radio services were hybrid communications, combining characteristics of both broadcasting and point-to-point services.<sup>92</sup> Furthermore, both the courts and the Commission have concluded that the point-to-point or non-broadcast characteristics of radio and video (*i.e.* MDS) subscription services bring them within the scope of section 605 protections against unauthorized interception and publication.<sup>93</sup>

### *STV as Broadcasting*

The FCC struggled with its determination that over-the-air STV was broadcasting under section 153(o). The FCC instituted proceedings in 1955 to formulate regulations of STV. In 1966, the Commission ruled that STV could properly be transmitted by an FCC broadcasting licensee because it was broadcasting under section 153(o).<sup>94</sup> Over-the-air subscription television was not authorized on a permanent and national basis, however, until 1968.<sup>95</sup>

---

98 CONG. REC. 9032, 9033 (1952) (remarks of Rep. Hinshaw). The statutory definition of broadcasting was never altered.

91. The court in *Functional Music, Inc. v. FCC*, 274 F.2d 543, 548 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959), reversed the FCC's decision that subscription music services on a simplex basis were not broadcasting. The FCC subsequently prohibited simplexing because the contractual nature of the service could inhibit the licensee from controlling program selection and responding to public needs. See *In re Amendment of Part 73—Radio Broadcast Services—to proscribe the "simplex" transmission of subscriber background music by FM Broadcast Stations*, and to make related changes Report and Order, 2 RAD. REG. 2d (P & F) 1683, 1685-86 (1964).

92. *In re Application of WFTL Broadcasting Co.*, 45 F.C.C.2d 1152, 1153-54 (1974); *In re Amendment of Section 73.202(b)*, 61 F.C.C.2d 113, 117 (1976).

The Commission now requires subscription radio operators to transmit programming that is broadcast-related, even though the programming may be of interest primarily to limited segments of the public. 47 C.F.R. § 73.293(a)(1) (1980).

Conversely, because subscription radio services are not bona fide broadcast operations, the Commission may exempt an operator from statutory provisions applicable to broadcast stations. See *In re Request by Greater Washington Educational Telecommunications Assoc., Inc.*, 49 F.C.C.2d 948 (1974) (fairness doctrine, §§ 315, 399(a) not extended to a specialized informational subscription radio service for the blind).

93. See *Home Box Office, Inc. v. Pay TV of Greater New York*, 467 F. Supp. 525, 528 (E.D.N.Y. 1979); *KMLA Broadcasting Corp. v. 20th Century Cigarette Vendors*, 264 F. Supp. 35, 42 (C.D. Cal. 1967); *In re Application of WFTL Broadcasting Co.*, 45 F.C.C.2d 1152, 1154 (1974).

94. Further Notice of Proposed Rulemaking and Notice of Inquiry, *supra* note 41.

95. Fourth Order and Report, *supra* note 4. The rules promulgated in the report and the FCC's authorization of national over-the-air subscription television were affirmed in *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194 (D.C. Cir. 1969), *cert.*

The FCC has not specifically ruled upon the relationship of section 605 and STV, although it recognized the problem in 1966.<sup>96</sup> At that time, the FCC noted, "section 605 prohibits the unauthorized publication of communications, but expressly exempts 'the contents of any radio communication broadcast' from its application."<sup>97</sup> The Commission then invited comments as to whether it should recommend legislation to the Congress regarding section 605 and other provisions of the Act.<sup>98</sup>

In 1980, a staff report of the FCC's Office of Plans and Policy<sup>99</sup> suggested that STV should be protected by section 605 because "there is no distinguishing factor that would justify the exclusion of STV programming, but not the subscription programming by other licensees, from the protection afforded by Section 605."<sup>100</sup>

The report also indicated that the FCC never formulated a distinction between subscription radio services which are designated hybrid communications, and STV which is termed broadcasting.<sup>101</sup> According to the report, a reclassification of STV as a hybrid service would not undermine the Commission's authorization of STV on television broadcasting channels.<sup>102</sup> Implicitly, such a reclassification would also bring STV within the purview of section 605.<sup>103</sup> The FCC, therefore, can take steps on its own

---

denied, 397 U.S. 922 (1970). One commentator implies that the *National Ass'n of Theatre Owners* court gave special deference to the FCC's resolutions about STV because Congress procrastinated in dealing with the problem. The court may have also acted out of exasperation due to the FCC's prolonged study of STV prior to its regulation of the service, coupled with a sense of duty to settle the important issues involved. See Comment, *Subscription Television, the FCC and the Courts*, 15 St. Louis U.L.J. 283, 289 (1970). For an analysis of the FCC's prolonged struggle with the regulation of STV, see Brown, *The Subscription Television Controversy: A Continuing Symptom of Federal Communication Commission Ills*, 24 Fed. Com. B.J. 259 (1970-71).

96. Further Notice of Proposed Rulemaking and Notice of Inquiry, *supra* note 41, at 11.

97. *Id.*

98. *Id.*

99. DIRECT BROADCAST SATELLITES, *supra* note 53.

100. *Id.* at 124 n.17.

101. *Id.* at 124.

102. *Id.*

103. A reclassification of STV may be problematic from a technical standpoint. Multiplex systems and STV services are technically distinguishable, and subject to different regulations. Multiplexing, for example, is the simultaneous transmission of two or more signals within a single channel. 47 C.F.R. § 73.310(a) (1980). The subscription radio service, therefore, is a subsidiary of the broadcaster's main FM service. 47 C.F.R. §

to foster the protection of STV transmissions from interception and publication.

## F. CONCLUSION

Despite the Ninth Circuit's decision, the scope of protection afforded by section 605 remains unclear. Legislative history provides little assistance in discerning the exact meaning of the proviso or its relationship to subscription broadcast services.

Prior to the Sixth Circuit's opinion in *Chartwell*,<sup>104</sup> the federal courts looked to the definition of broadcasting under section 153(o) in order to determine whether section 605 protected subscription broadcast services. Only those transmissions that did not constitute section 153(o) broadcasting avoided the reach of the proviso and were protected by section 605.<sup>105</sup> The *Chartwell* court, however, redefined the meaning of broadcasting for section 605 purposes. Thus, programming not intended for the public use was protected.<sup>106</sup>

In *National Subscription Television*, the Ninth Circuit formulated yet another interpretation of the proviso. The court concluded that the proviso to section 605 exempted section 153(o) broadcasting only if the transmissions were for the public use.<sup>107</sup> Because STV employs a scrambled signal which is unintelligible without a decoder, the Ninth Circuit held that STV is not broadcast for the public use and does not come within the proviso.<sup>108</sup>

---

73.294 (1980). Moreover, normal radio receivers do not pick up the subcarrier frequency.

STV, on the other hand, involves transmissions over an allocated television broadcast channel which are receivable by all normal television sets. A reclassification of STV, therefore, would mean that non-broadcast or hybrid services were being transmitted over frequencies reserved for broadcasting. Yet, television broadcast licensees with FCC authorization to provide subscription service must also broadcast minimum hours of non-subscription programming, and the licensee is governed by the Commission's standard broadcast rules. 47 C.F.R. § 73.643 (1980). Thus, under current regulations the public is guaranteed a certain number of non-subscription programming hours on every television broadcast channel.

104. *Chartwell Communications Group v. Westbrook*, 637 F.2d 459 (6th Cir. 1980).

105. See *KMLA Broadcasting Corp. v. 20th Century Cigarette Vendors Corp.*, 264 F. Supp. 35 (C.D. Cal. 1967).

106. 637 F.2d at 465.

107. 644 F.2d at 824.

108. *Id.*

In the future, courts that deal with the relationship of subscription broadcast services and section 605 will face inconsistent analytical guidelines. The reach of the proviso, therefore, will depend upon the particular viewpoint adopted by each court. A careful delineation of the scope of protection afforded to contemporary communications services under section 605, or a specific sanction against interception of these services, must be prepared by Congress.<sup>109</sup>

Congress responded to a judicial call for legislation in the copyright area with a general revision of the Copyright Act in 1976.<sup>110</sup> By ruling that section 605 protects STV operations, the

---

109. In 1980, H.R. 7747 was introduced in the House. This bill would have amended the Communications Act of 1934 to prohibit the unauthorized interception and use of subscription telecommunications, and provided stiff civil and criminal penalties for a knowing interception. Subscription telecommunications were defined by the bill as "any telecommunication . . . which is intended for receipt in intelligible form only by a person who has agreed to pay a fee or charge to the person originating the telecommunication . . . ." H.R. 7747, 96th Cong., 2d Sess. (1980). The bill, however, was never reported out of committee.

An earlier bill, H.R. 3333, also addressed the issue. H.R. 3333 prohibited the interception of private communications which were defined as communications sent "with a reasonable expectation that such communication is not subject to being intercepted . . . until such communication is received by the intended recipient." H.R. 3333, 96th Cong., 1st Sess. (1979). A hearing was held in the House on April 24, 1979, but the bill was never voted on.

For an example of a specific sanction against interception, see CAL. PENAL CODE § 593e (West Supp. 1981) which provides:

Every person who for profit knowingly and willfully manufactures, distributes, or sells any device or plan or kit for a device, or printed circuit containing circuitry for interception or decoding with the purpose or intention of facilitating interception or decoding of any over-the-air transmission by a subscription television service made pursuant to authority granted by the Federal Communications Commission which is not authorized by the subscription television service is guilty of a misdemeanor punishable by a fine not exceeding two thousand five hundred dollars (\$2,500) or by imprisonment in the county jail not exceeding 90 days, or both.

110. See 17 U.S.C. §§ 101-810 (1976). Copyright problems developed when cable operators began to carry television signals from distant markets to subscribers without authorization from the originator of the broadcasts. The Supreme Court ruled that cable operators did not violate the Copyright Act, because cable systems did not "perform" the distant signals that they transmitted. See *Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.*, 415 U.S. 394 (1974); *United Artist Television, Inc. v. Fortnightly Corp.*, 392 U.S. 390 (1968).

In 1976, Congress revised the Copyright Act, and section 111 of the Act now provides a compulsory license for cable systems upon payment of a specified percentage of revenues for retransmission of distant non-network programs. 17 U.S.C. § 111 (1976).

Ninth Circuit may have diverted congressional attention from a segment of the Communications Act which desperately needs it.<sup>111</sup>

Moreover, the court's decision leaves a number of unanswered questions. Are video services such as cable and MDS automatically protected by section 605 because they do not utilize television broadcast frequencies, or must the courts determine the programmer's intent to transmit for the public use? How are communications sent by direct broadcast satellites (which indiscriminately transmit both pay and nonpay programming)<sup>112</sup> affected by the court's decision? In determining whether programming is broadcast for the use of the general public which, if any, of the following factors is critical—a scrambled signal, special receiving equipment, the charging of a fee or the technical method of transmission? Are individuals who construct decoders at home for private use guilty of violating section 605?

---

111. Senate bill 898, which comprehensively amends the Communications Act, passed in the Senate on October 7, 1981. The relationship of subscription broadcast services to § 605, however, has not been clarified by the language of the bill. Section 605 remains unchanged, except for the substitution of the word *interexchange* for *interstate*. S. REP. NO. 97-170, 97th Cong., 1st Sess. 146 (1981).

Another bill has been introduced in the House, however, which further amends § 605. H.R. 4727 leaves the language of § 605 intact, but adds substantial civil and criminal penalties for violation of the section. Civil penalties under the bill range from \$100, for an interception committed in ignorance of the law, to \$50,000 for a violation "committed willfully and for purposes of commercial advantage or private financial gain . . . ." H.R. 4727, 97th Cong., 1st Sess. (1981). Stiff criminal penalties are also provided.

The prescription of penalties for § 605 violations does not necessarily clarify the language of the section or explain the reach of the proviso. Faced with the penalties of H.R. 4727, however, it is unlikely that anyone will question the interpretation of § 605 by intercepting the signal of a subscription service. The Ninth Circuit's determination that STV is protected by § 605 would be a further deterrent to such an action. Therefore, H.R. 4727 would provide a strong disincentive to the interception of subscription services, but it would not directly assist in understanding the language of the section.

112. A direct broadcast satellite located in a geostationary orbit, receives signals from earth and retransmits them to small receiving antennae, known as earth stations, installed outside homes or other buildings. Broadcast satellites transmit both "free" (i.e. over-the-air TV broadcasts) and pay (i.e. MDS) programming. Since the receiving antennae do not discriminate between pay and nonpay programming, individuals with earth stations may find themselves in violation of § 605. Furthermore, the strict penalties prescribed in H.R. 4727 (as written when this Note went to press) will present a serious problem for private earth station owners unless they can recognize pay programming (perhaps through the use of scrambled signals) and devise a system to pay for it. *DIRECT BROADCAST SATELLITES*, *supra* note 53, at 7-8.

For a general discussion of satellite communications, see A. BELENDIUK & S. ROBB, *BROADCASTING VIA SATELLITE: LEGAL AND BUSINESS CONSIDERATIONS* (1979).

Perhaps one can view the Ninth Circuit's decision as a stop-gap measure. By restructuring the interpretation of the proviso, the court ensured the viability of an infant communications industry. It is obvious, however, that we need a consistent policy applicable to both broadcast and non-broadcast services as they develop.

In *National Subscription Television*, the Ninth Circuit rushed in to aid a budding industry. The responsibility for formulating a national communications policy and protecting communications, however, resides with Congress. It appears, therefore, that the battle against communications piracy should be waged in Congress—not in the courts.

*Marla Katz Westover*